

FILED

NOV 27 2012

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION


CLERK

HAROLD RUNNING BIRD,

CIV. 12-4187

Petitioner,

-vs-

OPINION AND ORDER

DOUGLAS WEBER, Warden, and
MARTY JACKLEY, Attorney General,

Respondents.

Petitioner, Harold Running Bird, an inmate at the South Dakota State Penitentiary, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

After a jury trial held in April of 2001, Petitioner was convicted of second degree rape and kidnapping. The trial court sentenced Petitioner to 75 years in prison for the kidnapping conviction and 25 years on the rape conviction, to be served consecutively. Petitioner's conviction was affirmed on appeal by the South Dakota Supreme Court on July 24, 2002. *See State v. Running Bird*, 649 N.W.2d 609 (S.D. 2002). In 2008, Petitioner filed a state habeas petition which was denied, without prejudice, on February 27, 2008. *See* Doc. 1, Attachment 1.

Petitioner's instant federal habeas petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), which imposes a one-year statute of limitations for filing federal habeas petitions. 28 U.S.C. § 2244(d)(1); *Beery v. Ault*, 312 F.3d 948, 949 (8th Cir. 2003). The federal limitations period runs from the date on which Petitioner's state judgment became final by the conclusion of direct review or the expiration of time for seeking direct review. *Id.* By Supreme Court rule, a petitioner has 90 days from the date of entry of judgment in a state court of last resort to petition for certiorari. *Id.*, Sup. Ct. R. 13. The statute of limitations is tolled, however, while "a properly filed application for State post-conviction review is pending." *Id.*; § 2244(d)(2). *See generally, Painter v. State of Iowa*, 247 F.3d 1255, 1256 (8th Cir. 2001) ("a review of our cases makes clear, however, that the time between the date that direct review of a conviction is completed and the date that an application for state post-conviction relief is filed counts against the one-year

period.”). See also *Curtiss v. Mount Pleasant Correctional Facility*, 338 F.3d 851, 853 (rejecting the suggestion that the federal filing deadline had not expired because state petition was timely filed according to state law, and federal petition was filed within one year after state statute of limitations had expired); *Jackson v. Ault*, 452 F.3d 734, 735 (8th Cir. 2006) (“It does not matter that [petitioner’s] . . . state post conviction relief application was timely filed under [state] law. The one year AEDPA time limit for federal habeas filing cannot be tolled after it has expired.”).

The Court may raise the statute of limitations issue *sua sponte*. *Day v. McDonough*, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006). The Court must, before acting on its own initiative to dismiss the federal petition based on the AEDPA statute of limitations, “accord the parties fair notice and opportunity to present their positions.” *Id.* Further, the Court must “assure itself that the Petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or dismissing the petition as time barred.” *Id.* Accordingly, the Court will order the parties to show cause why his federal petition should not be dismissed as untimely.

CONCLUSION AND ORDER

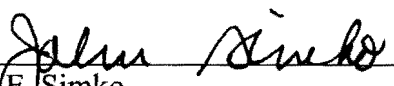
Accordingly, it is hereby

ORDERED that:

- (1) The Clerk of Court is directed to serve a copy of the petition and this Order upon Respondents;
- (2) On or before January 2, 2013, the parties shall file briefs, documentation, and/or other appropriate authority showing cause why Petitioner’s federal habeas petition, filed October 31, 2012, should not be dismissed as untimely pursuant to 28 U.S.C. § 2244(d)(1).

Dated this 27 day of November, 2012.

BY THE COURT:



John E. Simko
United States Magistrate Judge